FILED
SEP 30 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1059 76

DANT & RUSSELL, INCORPORATED,

Petitioner and Appellant,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. MCDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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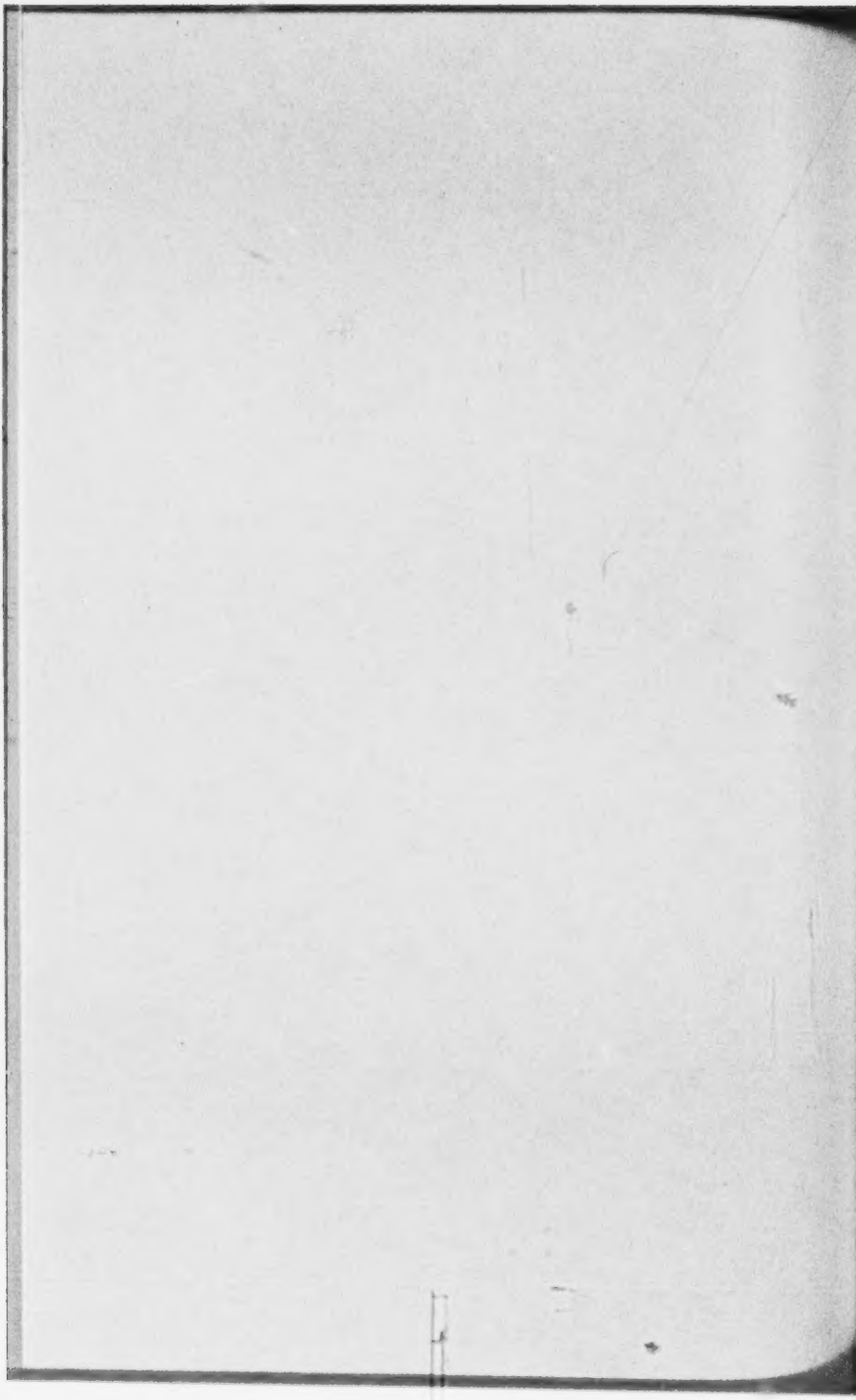

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The Federal Question.

The three State Court decisions closely concerned themselves with the Federal Constitutional question. The attempt here is made to show that a decision might have been made on a non-federal ground. But that is not the test of the jurisdiction of this Court. Otherwise a State decision impairing the operation of Federal laws, such as a State decision at bar, could stand, because, perchance, some immaterial State question might have been involved. The rule is stated in

Indiana ex rel. v. Anderson, 303 U. S. 95; 82 L. Ed. 685.

"Where the State Court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the State Court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground."

State Practice.

No State Court decision adverse to the position of petitioner has been or can be cited. Such decisions, where found, support petitioner on the matter of state practice. Respondents rest solely on their *ipse dixit*. These points of practice are here raised for the first time; they were never considered by any of the State Courts. If there raised, the decision under the authorities hereinafter cited must have been adverse to respondents.

Three California courts gave this case careful consideration—the Superior Court, the District Court of Appeal, and the Supreme Court. The fourth amended petition presented here indicates three prior pleadings in the trial court. The District Court of Appeal upheld petitioner's contentions; the Supreme Court twice gave the case its attention. The opinion of all of these Courts dealt exclusively with the Federal Constitutional question. Remarkable is it that respondents have the temerity to insinuate that a possible State practice decision could have been adequate; no one of the State Courts ever did or could have held with respondent on these matters here raised for the first time.

ARGUMENT.

I.

Cancellation, Under the Statute, Was the Duty of the Board of Supervisors. The Writ of Mandamus Was the Proper Remedy.

The assessment was, as shown in the opening brief, erroneously and illegally levied. The affidavits show the grounds. The export clause of the Federal Constitution applies on the facts as stated in the affidavit of Thomas W. Dant. True, it requires striking these items from the assessment roll. The California law requires this in order to rectify an injustice. The striking out of this public record is made by officers authorized by law so to do. The statute has been held valid and constitutional by the State Courts.

People v. Board of Supervisors, 126 Cal. App. 610-13;

City of Los Angeles v. Ford, 12 Cal. (2d) 407-11.

The State Courts have further held that mandamus is the proper remedy; that the duty of the Board of Supervisors to strike out the illegal or erroneous assessment is positive and not a matter of discretion.

Los Angeles v. Board of Supervisors, 108 Cal. App. 655-66.

"If a showing was made in this case of the invalidity of the assessment, it was mandatory upon the Board to act."

City of Los Angeles v. Ford, 12 Cal. (2d) 407-11;

People v. Board of Supervisors, 126 Cal. App. 670-3.

II.

The Statutes for Correction of Errors in Tax Collection Are Remedial and Should be Liberally Construed.

Unquestionably the form of the claim made, as the exhibits show, was in accordance with Section 3804 of the Political Code which deals with the case of refunds demanded where the tax has been paid rather than 3804a which deals with the mere assessment. Both sections deal with the case of taxes "erroneously or illegally collected." But the greater includes the lesser. Necessarily, demand for refund requires a cancellation of the assessment. Necessarily, if the assessment is cancelled on the ground of illegality, the money collected must be repaid.

The demand was denied by the Board. It was in the form presented by either Sections 3804 or 3804a. The action which the petitioner prays be taken in cancelling the assessment is merely less than the petitioner, under the plain provisions of the Sections, was entitled to demand. Respondents, therefore, have no occasion to quibble here over a point which could easily have been cleared in the State Courts if they called attention of Court or counsel thereto.

The statutes are remedial and should be liberally construed to carry out their intent and object.

Pacific Coast v. Wells, 134 Cal. 471-75.

The Court quotes from a New York case the following:

> "This proceeding is not governed by the technical rules that apply to actions at law to recover money voluntarily paid, or to suits in equity to remove a cloud upon title. The statute furnishes a convenient and summary remedy which enables the county to

restore, without litigation or expense, what it ought not to retain, and a citizen who has paid an illegal tax, without waiting to have his property advertised and sold, to obtain justice."

Orpheum Circuit v. County of L. A., 12 Cal. App. (2d) 257-61;

Otis v. San Francisco, 170 Cal. 98;

Associated Oil v. County of Orange, 4 Cal. App. (2d) 5-11.

As stated "demand for refund" necessarily includes "demand for cancellation." There necessarily could have been no denial if presentation had not been made. It is not part of good pleading to allege evidentiary matters.

III.

Mandamus Is the Proper Remedy Under Settled California Law in Case of Rejection by the Board of Supervisors.

Los Angeles v. Board of Supervisors (*supra*), 108 Cal. App. 655-66;

Central Mfg. Dist. v. Board of Equalization, 214 Cal. 288-91.

There are, it is true, alternate methods of recovery for taxes illegally exacted, but under California law, as stated in the cases cited, under heading III, and as summarized in the last case above cited, the writ of mandamus is a proper remedy to compel the Board to cancel the assessment, refund the taxes paid, or either thereof, whenever the taxes have been erroneously or illegally collected. The prerequisite is merely a verified demand such as here made. The Supreme Court of California, in 1931, in the case last cited stated the State rule when it was "It is conceded that mandamus is the proper remedy."

IV.

The Verified Demand Set Forth Facts Which Brings the Case Under the Federal Constitutional Prohibition Upon State Taxation. It Thereby Showed An Illegal Collection of Taxes.

The affidavit of Thomas W. Dant sets forth that the lumber in question was imported from the Philippine Islands and at the time of assessment was in the same shape and condition as when imported; that none was sold and none intended to be sold in California. This is a substantial compliance with the statute.

Substantial compliance with the statute as to filing of claim is all that is necessary.

> *Sandstoe v. A. T. & S. F. Ry.*, 28 Cal. App. (2d) 215-23;
>
> *Uttley v. Santa Ana*, 136 Cal. App. 23.
>
> "When there is no evident intention to mislead but a *bona fide* attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead."

The purpose of the statute is accomplished if the matter is brought to the attention of the proper officials in order that they may be advised as to the position taken as to liability for payment.

Again, this is the first time that the insufficiency of the claim has been raised. The counsel for both parties argued and submitted the case, all understanding thoroughly that a clear and valid claim was filed. It is to be noted the claim was alleged to have been filed with respondent's counsel here appearing. The claim is, under California law, sufficient.

V.

The Proof Requirement.

No California decisions supporting the position taken by respondents under this head are cited. This is apparently for the reason that the only discoverable citation is adverse. The "satisfactory proof" provision of Section 3804a was evidently inserted as a verified claim is not there required. The sworn affidavits here necessarily fill the place of satisfactory proof. The following noted case was under Section 3804a. The demand was unverified and no proof offered to substantiate the claim. It seems to be the only case upon this point. It is adverse to the position of respondents on the demand for "satisfactory proof." It is practically the same question as here raised. In the case above cited of *Los Angeles v. Board of Supervisors*, 108 Cal. App. 655, the same question as to the request of proof was raised. The trial court stated, in denying mandamus that at the hearing before the Board no evidence was offered by the petitioner (p. 655). The form of the demand, similar to that in the case at bar, is set forth in *haec verba* (p. 660). The assessments were by the filing of the demand, as public records, before the Board. The assessments, together with the demand, were sufficient to cause the Board to take proper action. The judgment of the trial court was accordingly reversed.

Conclusion.

A vitally important Federal question is here raised. The State Court has decided adversely to the Federal right asserted. The matter of State practices has been raised for the first time. It was never considered by any of the three State Courts. Examination of the points in the light of California State law shows that they would not have been valid objections to the procedure adopted in the State Courts.

In the interests of justice, of economy, and expedition in the determination of the important Federal question raised by the three State Court decisions, petitioner prays on its own behalf, and on behalf of the great foreign import business, that this Honorable Court consider and determine these vital Federal questions.

Respectfully submitted,

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